

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 04-11133-JMD
Chapter 13

Timothy Carey and
Amanda Carey,
Debtors

*Michael B. Feinman, Esq.
Feinman Law Offices
Andover, Massachusetts
Attorney for Debtors*

*Peter V. Doyle, Esq.
Shaines & McEachern, P.A.
Portsmouth, New Hampshire
Attorney for Creditors Wayne and Eileen Ewald*

*Geraldine Karonis, Esq.
Assistant United States Trustee
Attorney for Phoebe Morse, United States Trustee*

MEMORANDUM OPINION

I. INTRODUCTION

The Court has before it a Motion for Allowance and Reimbursement of Legal Fees and Expenses filed by Michael B. Feinman, attorney for the Debtors (Doc. No. 201) (the “Motion”) to which creditors, Wayne and Eileen Ewald (the “Ewalds”), and the United States Trustee (the “UST”) objected (Doc. Nos. 206 and 207). The Court held a hearing on the Motion on November 9, 2005, and took the matter under advisement. The parties filed supporting memoranda as permitted by the Court (Doc. Nos. 210, 218, and 222).

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

On March 29, 2004, the Debtors filed a chapter 7 bankruptcy petition with the assistance of an attorney. During the course of the chapter 7 case allegations were raised against the Debtors regarding an alleged misappropriation of funds that were otherwise property of the estate. In addition, allegations were made against the Debtors that their bankruptcy schedules contained numerous inconsistencies and/or omissions. In early July 2004, several creditors, including the Ewalds, brought non-dischargeability actions against the Debtors. Shortly thereafter counsel for the Debtors withdrew his representation.

On August 23, 2004, Attorney Feinman filed a notice of appearance for the Debtors as successor counsel. Prior to filing his notice of appearance, Attorney Feinman received a retainer in the amount of \$10,500.00 paid by third parties. On October 22, 2004, the Debtors filed a motion seeking to convert their case to chapter 13. On December 27, 2004, the Court approved a compromise that, among other items, required the Debtors to pay to the chapter 7 trustee the sum of \$42,000.00. Upon receipt of the entire \$42,000.00, and payment of chapter 7 administrative expenses,¹ the Debtors would be permitted to convert their case to chapter 13 under the terms of

¹ The compromise specifically stated that “[a]ll Chapter 7 administrative expenses will be paid in full by the Chapter 7 Trustee prior to conversion of the Debtors’ case to a Chapter 13 proceeding.” The Court notes that Attorney Feinman’s application was not filed until after the date of conversion.

the compromise. Having made the required \$42,000.00 in payments, the Debtors filed another motion to convert their case to chapter 13 on August 9, 2005. The Court granted the Debtor's motion the same day.

On September 30, 2005, Attorney Feinman filed the Motion seeking allowance of fees in the amount of \$24,129.00 and expenses in the amount of \$2,362.68. In support of the Motion, Attorney Feinman filed a narrative statement that outlined his services, a billing statement that detailed the hours expended, the tasks performed, and the expenses incurred, and the Court's required fee annex form. From the detailed billing statement it appears that, during the chapter 7 phase of the Debtors' case, Attorney Feinman performed 92.6 hours of service for \$22,964.50 in fees and incurred \$2,215.95 in expenses. Of these fees and expenses, \$19,307.00 in fees and \$2,177.72 in expenses were incurred prior to the Debtors' agreement to enter into a compromise with the chapter 7 trustee. After conversion to chapter 13, Attorney Feinman provided additional services for which he charged \$1,577.00 in fees and \$146.73 for reimbursement of expenses.

It is undisputed that at no point during the chapter 7 phase of the Debtors' case did Attorney Feinman seek to be employed by the chapter 7 trustee. In fact, much of the Debtors' and Attorney Feinman's efforts during this period were adversarial to those of the chapter 7 trustee.

III. DISCUSSION

The first issue the Court must address is whether Attorney Feinman is entitled to compensation during the chapter 7 phase of the Debtors' case. The second issue is whether Attorney Feinman's fees and expenses are compensable and reimbursable under 11 U.S.C. § 330(a), whether incurred during the chapter 7 or chapter 13 phase of the case.

A. Compensation During Pre-Conversion Chapter 7 Phase

The United States Supreme Court has held under the plain language of section 330(a) of the Bankruptcy Code that debtors' attorneys are not entitled to an award of compensation from estate funds in a chapter 7 proceeding unless the attorney was employed by the trustee and such employment was approved by the court under section 327. Lamie v. U.S. Trustee, 540 U.S. 526, 538-39 (2004). In Lamie, the debtor's bankruptcy attorney sought compensation under section 330(a)(1) for legal services he provided to the debtor after the debtor's bankruptcy case converted from chapter 11 to chapter 7. In its decision, the Supreme Court noted that, upon conversion, debtor's counsel's services under section 327, as an attorney for a debtor-in-possession, terminated. Despite this termination, debtor's counsel continued to provide legal services to the debtor even though he did not have the trustee's authorization to do so. The Supreme Court concluded that "[a] debtor's attorney not engaged as provided by § 327 is simply not included within the class of persons eligible for compensation." Id. at 534. Debtors may retain an attorney; however, the attorney's compensation may not be awarded from estate funds. Id. at 538.

In the instant case, the facts present a mirror image to those presented in Lamie. Here, the Debtors' case began as a chapter 7 proceeding and then converted to chapter 13. While Attorney Feinman attempts to distinguish these facts and argues that he is entitled to compensation from the estate because, upon conversion of the case to chapter 13, he became a professional person employed under section 327 and a new bankruptcy estate, from which his fees and expenses can be paid, was created. The Court is convinced, nonetheless, that Lamie dictates that Attorney Feinman not be compensated from the Debtors' bankruptcy estate for services undertaken during the chapter 7 proceeding as Attorney Feinman did not come within the terms of section 330(a)(1)

as he was not employed as a professional person by the chapter 7 trustee pursuant to section 327. Prior to the Lamie decision, and without deciding the issue of whether a chapter 7 debtor's attorney was entitled to compensation under section 330 of the Bankruptcy Code, this Court had ruled in an unpublished decision that debtor's counsel in a voluntary chapter 7 case should not seek payment from the bankruptcy estate when counsel's retainer proves insufficient where counsel has not sought consent from the trustee or approval from the Court before performing the services for which he seeks payment from the bankruptcy estate. In re Sprague Floor Coverings, Inc., 2000 BNH 051. "[T]he bankruptcy estate should not become the involuntary surety of fees for the debtor's counsel. Absent unusual circumstances, those risks should not be transferred to the bankruptcy estate without the consent of the Chapter 7 trustee." Id. at 5-6.

Accordingly, the Court must deny the Motion to the extent that it seeks approval and payment of Attorney Feinman's fees in the amount of \$22,964.50 and reimbursement of expenses in the amount of \$2,215.95 from estate funds currently being held by the chapter 13 trustee. Attorney Feinman, however, may apply any outstanding retainer against these fees and expenses.

B. Compensation Post-Conversion During the Chapter 13 Phase

Attorney Feinman has sought approval and payment of fees in the amount of \$1,577.00 and reimbursement of expenses in the amount of \$146.73 for services performed post-conversion during the chapter 13 phase of the Debtors' bankruptcy case. Attorney Feinman's fees may be compensable only if they were for "actual" and "necessary" services and if they are "reasonable." 11 U.S.C. § 330(a)(1)(A). His expenses are reimbursable only if they were "actual" and "necessary." 11 U.S.C. § 330(a)(1)(B). From the detailed breakdown of Attorney Feinman's services, it appears that the majority of the fees were incurred meeting with the Debtors,

preparing and reviewing the Debtors' chapter 13 plan, and preparing for, traveling to, and attending the 341 meeting. The remaining services appear to relate to the Debtors' legal malpractice claim. The expenses are for postage and copies. While on their face Attorney Feinman's services and expenses appear to be actual and necessary and the amounts appear to be reasonable,² the Court believes it is premature to approve such fees at this time when the Debtors' chapter 13 plan has not yet been confirmed and the results of the chapter 13 phase of the case are unknown. Accordingly, by separate order, the Court will schedule a further hearing on the Motion to determine whether services totaling \$1,577.00 are compensable under section 330(a)(1)(A) and expenses totaling \$146.73 are reimbursable under section 330(a)(1)(B) and therefore payable from the chapter 13 estate.

IV. CONCLUSION

For the reasons set forth above, by separate order, the Court will deny in part and continue in part the Motion. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

ENTERED at Manchester, New Hampshire.

Date: February 1, 2006

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge

² The Court notes that the fees sought by Attorney Feinman for the chapter 13 phase of the Debtors' case are within the UST's guidelines for this district and, therefore, pursuant to LBR 2016-2 and AO 2016-2, Attorney Feinman would not have been required to file an itemized application for compensation unless otherwise ordered by the Court.